No. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF FOR RESPONDENT LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827.

ALFRED C. BENNETT,

Counsel to the Superintendent of Insurance of the State of New York, as Liquidator of the Domesticated United States Branch of The First Russian Insurance Company, Established in 1827, Respondent.

160 Broadway,
New York City, N. Y.

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CASES CITED.

STATUTES.

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Opinions Below

The memorandum opinion of the Special Term Justice of the Supreme Court, New York County, (R. 52) is not reported. The judgment and order was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York (First Judicial Department) without opinion (R. 57), reported in 259 A. D. 871. The judgment was unanimously affirmed by a per curiam opinion of the New York Court of Appeals (R. 71-72), reported in 284

N. Y. 555. The opinion of the New York Court of Appeals in *Moscow Fire Insurance Co.* v. *Bank of New York*, is reported in 280 N. Y. 286.

Jurisdiction

The appellant claims that jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1935. Respondent contends, as is more fully set forth in Point One hereunder, that the writ of certiorari in this case was improvidently granted, that there are no federal questions to be determined, and that this appeal should be dismissed upon this ground alone as well as upon the merits. Neither the petition for the writ of certiorari hereunder nor appellant's brief herein disclose any specific federal law, constitutional provision, or treaty violated by the decision below, raising a question to be decided by this honorable Court. The Litvinoff assignment and its acceptance (R. 36a-36c) merely authorized prosecution by the United States Government of any claim the Soviet Government might theretofore have prosecuted, subject to the laws of the jurisdiction in which such claim might be advanced or made. The assignment and acceptance by the United States, sometimes referred to as the treaty, did not give any greater force or effect to such claims nor were they altered in any respect (*Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143; *United States* v. *Belmont*, 301 U. S. 324, 335, 336; *United States* v. *Bank of N. Y. and Trust Co.*, 296 U. S. 463; *Moscow Fire Ins. Co.* v. *Bank of N. Y.*, 280 N. Y. 286; aff'd. 309 U. S. 624; rehearing denied, 309 U. S. 697).

Questions Presented

1. Whether under applicable statutes and decisions of the New York Courts, construing its Rules of Civil Practice and the provisions of its Civil Practice Act, summary judgment in favor of the respondent dismissing the complaint of

the United States of America herein on the merits, was properly granted by the court below.

2. Is it proper, and will this Court upon the present appeal permit petitioner to reargue the case of *The United States* v. *Moscow Fire Insurance Company*, decided on February 12th, 1940 by this Court, 309 U. S. 624; rehearing denied 309 U. S. 697.

3. If so, and respondent respectfully submits that rehearing having already been denied in that case by this honorable Court, it should not be heard on this appeal, nevertheless, the decision in the *Moscow* case was correct.

Summary of Argument

Not only were all the questions involved in the present record determined adversely to the Government in the *Moscow* case (309 U. S. 264), which case appellant is attempting to reargue on the present record, but the primary question involved herein is the propriety of the judgment of the highest court of New York granting summary judgment under Rule 113 of the Rules of Civil Practice. Briefly stated, the rule requires judgment dismissing the complaint if either party, challenged by the opponent's motion papers and affidavits, fails to show that an issue is present calling for a trial. No such issue was established by appellant, and the New York Court of Appeals in the decision below (284 N. Y. 555) affirmed judgment under Rule 113 in favor of the defendant, Superintendent of Insurance. It found that there were no new issues and that the decision of the New York Court of Appeals in the *Moscow* case (280 N. Y. 286, affirmed by this Court, 309 U. S. 624) left open no question presented by the record herein. The New York Court of Appeals unanimously agreed that without again considering such questions, in determining title to assets of First Russian Insurance Company deposited in New York, it should apply in this case the same rules of law which the court applied in determining title to the assets of

the *Moscow Fire Insurance Company* deposited here. This case does not come before this Court on a demurrer where the facts are admitted for the purposes of the motion. Petitioner, in its brief repeatedly makes this assertion but is clearly in error as to New York practice rules. It is well established in New York that on motions under Rule 113 a plaintiff cannot rely on the allegations of the complaint as proof, nor are they deemed to be true (*White* v. *Merchants Dispatch Transportation Co.*, 256 App. Div. 1044; *Gnozzo* v. *Marine Trust Co.*, 258 App. Div. 298, aff'd 284 N. Y. 617).

It is respectfully submited that this Court under well defined rules and precedents will not review or, if it does review, should accept the construction placed upon state statutes by the highest court of such state.

Respondent does not believe that this Court will tolerate a reargument of the *Moscow* case upon the record at bar. The holdings in the *Moscow* case, nevertheless, were amply supported by the record therein, and the law as established by the Court of Appeals in 280 N. Y. 286 was justified in all respects.

This case raises no federal question whatsoever, is based purely upon a construction of state law, applicable to assets located in the state, and should be dismissed for that reason alone as well as upon the merits.

Statement

The statement of facts set forth in appellant's brief, at pages 4 to 11, is correct, with the following modifications:

Throughout its brief appellant emphasizes the point that the complaint was dismissed by the New York courts for failure to state a cause of action, and that under the applicable New York statute (New York Civil Practice Act) and decisions thereunder, the allegations set forth in the complaint must be deemed to be true just as though the defendant had demurred; therefore, that the defendant conceded the fact and conclusion of law advanced by the Govern-

ment, to wit, that under the Soviet decrees title to assets, wherever situated, passed to the Soviet Government by virtue of the said decrees. As more fully hereunder shown by respondent, a motion for summary judgment does not concede any of the facts set forth in the complaint, but, on the contrary, puts the plaintiff to the burden of establishing by affidavit or other competent evidence that there is a real issue worthy to be tried by the court. Appellant was unable to sustain this burden and the court below properly found that there was no issue and that the complaint should be dismissed (see Point Two hereunder). In the *Moscow* case, and obviously in this case, respondent not only denies, but the courts have held, that the decrees did not and could not have vested title in the Soviet Government to these New York assets. Respondent's answer in no uncertain terms denies each and every allegation of the complaint purporting to establish that the New York assets passed to the Soviet Government, appellant's assignor herein (R. 37-49).

Appellant on page 8, referring to the full trial had in the *Moscow* case (280 N. Y. 286; affirmed 309 U. S. 624), states that "many of the same questions" as are presented by the pleadings herein were decided in that case. Respondent respectfully submits that the very same questions as are presented in the case at bar were before the New York courts and this Court in the *Moscow* case, and were resolved against the Government. There is possibly one difference between the *Moscow* case and the case at bar, namely, that in this case it would appear from the records in the Superintendent's possession, that there is no surplus after paying or making provision for the payment with interest of all allowed foreign claims filed with the Superintendent, as liquidator and the foreign claims covered by pending attachment suits in the New York Supreme Court. In the *Moscow* case it was asserted that after paying foreign claims there still existed a surplus, which, at least, should be given to the Government in preference to the shareholders or directors who were asserting claims thereto.

In the case at bar, there are no shareholders' claims, and, although the transcript of record does not clearly set forth the present figures, the Superintendent of Insurance, as liquidator, an administrative official of the State of New York, is taking the liberty of showing in the footnote hereunder the present status of the assets and claims.[1]

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[1] An analysis of the assets on hand in the Liquidator's possession and foreign claims filed and allowed, but unpaid, together with foreign claims covered by pending attachment suits in the New York Supreme Court all as of December 1st, 1941,—reflects the following situation:

Cash in Banks	$ 587,131.16	
Less amount reserved for expenses of liquidation pursuant to Court order	25,810.06	
Amount of cash available for payment of foreign claims and interest	$ 561,321.10	
Securities owned (approx. present-day value)	611,160.00	
Total	$1,172,481.10	
Unpaid allowed foreign claims		$ 283,635.70
Unpaid interest at 6% on all foreign claims heretofore allowed with interest by Court orders		371,742.80
Foreign attachment suits pending (exclusive of interest)		758,382.54
Calculated approximate interest at 6% on these foreign attachment claims, computed from October 16th, 1931 to December 1st, 1941.		460,717.39
Total liability for unpaid foreign claims and attachments with estimated interest		$1,874,478.43
Possible additional liability for interest on interest unpaid		108,109.72
Total known and possible liability on all foreign claims filed and attachments as of December 1st, 1941		$1,982,588.15

The fact that in the First Russian proceedings there was no surplus after paying or providing for payment of all just foreign claims was confirmed by order of the New York Supreme Court dated and entered May 13, 1932. It found that after payment of domestic creditors the surplus was $1,393,198.42 but after providing (in accordance with 255 N. Y. 415) that foreign claims theretofore filed might be proven in the liquidation proceedings, it decreed that "there were no surplus assets against which further attachments might be levied or available for distribution to a quorum of the directors of the Insurance Company" (Government's complaint herein, par. 17; R. 29).

In the Moscow proceeding relatively few claims were filed, there was a surplus after payment of all foreign claims filed with the Liquidator and the surplus was turned over to a depositary (the conservator having elected not to put up a bond). Thereafter, a proceeding was instituted by the conservator and stockholders to determine the method of distribution of that surplus fund. The Liquidator was not a party to that action since he had completed his duties when the Moscow surplus was turned over. The United States, however, intervened in said action, asserting paramount title over and above the title of the remaining foreign creditors, stockholders or owners of the funds, to the surplus which had been turned over by the Liquidator.

In the First Russian liquidation proceeding, however, the Liquidator is still functioning, the liquidation is still incomplete (R. 16, 34, 42, 48). In this proceeding no stockholders are involved, and there is no surplus available to be turned over to anyone. Unlike the *Moscow* case the Liquidator here has not paid all the valid and allowed claims filed with him pursuant to the Court of Appeals decision in 1931, and has not turned over any surplus to the company represented by its Board of Directors. It is quite apparent that there will be no such surplus.

The assignment or so-called treaty upon which the Government bases its claim (complaint, par. 19; R. 31 and

R. 36a-36d) was expressly conditioned upon a final settlement of claims and counterclaims between the Government of the Union of Soviet Socialist Republics, the United States of America and the claims of their nationals. The defendant herein in its answer (R. 45) shows that on information and belief the negotiations for such settlement have been terminated with no settlement arrived at, and that, therefore, the conditions of the said agreement or assignment have not been complied with and it is now in all respects null and void and non-enforceable. The motion by defendant for summary judgment herein put plaintiff to its proof, or at least to prima facie evidence to be supplied in an affidavit, supporting the validity of the assignment. No such proof by affidavit, or otherwise, was offered by the Government.

The answer (par. 11; R. 43) raises the additional point that in the so-called assignment-treaty the Soviet Government agreed not to make any claim with respect to judgments rendered or that may be rendered by the American courts in so far as they relate to property or rights or interest therein, in which the Soviet Government or its nationals may have had or may claim to have an interest (Complaint, Ex. 1; R. 36b and 36d). The decision of the New York Court of Appeals, reported in 255 N. Y. 415, and the orders of the New York Supreme Court entered on the remittitur thereof, completely and with finality directed and fixed the disposition of the surplus assets. These are final orders from which there was no appeal. The subsequent decision of the New York Court of Appeals and of this Court in the *Moscow* case, and in the case at bar, merely carried out the provisions of these final orders. Apparently, the Soviet Government and the United States Government itself, recognized this by the wording of the assignment and the acceptance thereof.

The Interest of the State of New York

Appellant refers on page 11 of its brief to the interest of the State of New York and contends that the State, as such, "has no interest whatever apart from the physical presence of the assets within the State." The State of New York is not a party to this proceeding and never has been. The assets have at all times been held by the Superintendent of Insurance of the State of New York, as statutory liquidator and trustee of the funds, whose duty it is at all times to administer them subject to the statutes and court orders and decisions of New York State. For many years, and prior to the decision of the New York Court of Appeals in *Matter of People, (First Russian Insurance Co.)*, 255 N. Y. 415, the Superintendent of Insurance, as liquidator and trustee, after adjudicating and making provision for the payment of all domestic claims, with interest, had recommended as his plan for the disposition of the surplus, that the same should be held until a responsible liquidator abroad came into being to whom the funds might be transmitted, or until recognition of the Soviet Government by the United States of America, or in accordance with any provision of a treaty of the United States (255 N. Y. 415, 421). The Attorney General of the State of New York, appearing in the proceedings on behalf of the State of New York, contended at one time that the surplus should be turned over to the New York comptroller, not on any theory of escheat to the State of New York, but merely for purposes of conservation, until final distribution. The New York Supreme Court at Special Term, and the Appellate Division on appeal (229 A. D. 637) adopted the Superintendent's plan and disposed of the contentions of the State of New York by holding that it would serve no useful purpose to transfer the funds for purposes of conservation from one public official to another. The Court stated that no serious claim to escheat had been asserted by the State. Upon appeal to the Court of Appeals, however, it was held (255 N. Y. 415) in a learned opinion by

Chief Judge Cardozo that the funds had been held long enough by the Superintendent of Insurance and should be made available for payment to creditors and policyholders with claims founded upon foreign business; that foreign claims duly filed or to be filed within a reasonable time should be adjudicated and paid and that the residue, if any, should go to the shareholders and directors; that the administrative machinery of the State of New York should no longer be clogged, its Liquidator no longer burdened and the New York Courts no longer vexed with problems not their own, to wit: the problem of distributing the surplus after payment of all claims both of domestic and foreign creditors.

Following this decision, and the order or decree entered upon the remittitur, it became the duty of the Superintendent of Insurance, as trustee, to recognize and pay foreign claims and turn over the residue, if any, to the directors, all in accordance with the final judgment rendered by the Court of Appeals. These proceedings all took place prior to recognition of the Soviet Government by the United States and prior to the intervention by the United States in these proceedings. The State of New York, and the Superintendent of Insurance of that State, as liquidator and trustee of these funds, are interested solely in seeing that the funds are distributed to the rightful owners thereof as prescribed by the statutes, decrees and orders of its highest court.

POINT ONE.

The writ of certiorari in this case was improvidently granted and should now be dismissed.

The record in the case at bar presents no federal question for review, nor did the record in the *Moscow* case, recently decided by this Court, present any such question. In the case at bar, the decision of the New York Court of Appeals (284 N. Y. 555) (R. 71), affirming a judgment for

the defendant dismissing the complaint on his motion for summary judgment, merely held that there were no issues to be tried; that the previous decision of the New York Court of Appeals in *Moscow Fire Insurance Co.* v. *Bank of New York* (280 N. Y. 286; affirmed without opinion by this Court in 309 U. S. 624; rehearing denied, 309 U. S. 697), determined the case at bar and left open no question to be argued. The Court held:

> "We are agreed that without again considering such questions, this Court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

The New York Supreme Court, in a short decision by the Special Term Justice (R. 52), had theretofore granted summary judgment on the authority of the decision in the *Moscow* case. The New York Appellate Division affirmed without opinion (259 A. D. 871). It appears from these decisions in the case at bar that a Special Term Justice, five justices of the Appellate Division, and seven Judges of the Court of Appeals, unanimously found that under the applicable provisions of the Rules of Civil Practice (Rule 113), there were no issues to be tried in this case, and that judgment should properly be for the defendant.

Respondent challenges the appellant to point out where any federal questions are raised in the record at bar. The claim asserted by plaintiff herein is predicated solely upon Soviet decrees (Complaint, Pars. 8, 9, 10; R. 23, 24) and is not based on any treaty or federal law. There is no question here as to the validity of a treaty or statute of the United States or the validity of any State statute as being repugnant to the Constitution, treaties or laws of the United States. Nor is there involved here any right, title, privilege or immunity under the Constitution or any treaty or statute of the United States, or commission held

or authority exercised under, the United States within the meaning of Section 237(b) of the Judicial Code. The sole question decided in the *Moscow* case and applied in the case at bar upon the same questions of fact and law was that these Soviet decrees did not pass title extraterritorially to assets always situate in New York, belonging to the Domesticated United States Branch of the First Russian Insurance Company, a separate and distinct entity under New York law; that New York law governed and that foreign creditors have been given vested rights in these assets. Neither the Government's petition for writ of certiorari, nor its brief herein, show any specific federal law, constitutional provision or treaty upon which its contentions are founded. Analysis of the moving and opposing affidavits is more fully set forth in Point Two of this brief. Suffice it to state that the sole opposing affidavit of the Government raised no federal issue and, as a matter of fact, raised no issue whatsoever, *but merely requested the Court to hold the decision in abeyance pending a determination of the Moscow case by this honorable Court* (R. 50-51).

Respondent submits that if the Government must rely upon the *Moscow* case in support of its contention that a federal question is presented for review herein, we respectfully assert that no federal question was properly presented for review by this Court even in that case. The appellant in this case must, of course, concede that a federal question is not presented merely because plaintiff is the sovereign. That its claim rests solely on the title by assignment from the Soviet Government, and has no added force and effect because it is being asserted by the United States as assignee, was determined by this Court in the *Belmont* case and in the *Guaranty Trust Co.* case, supra.

Mr. Justice Stone, in his opinion in the *Belmont* case, held as follows:

> "It seems plain that, so far as now appears, the United States does not stand in any better position

with respect to the assigned claim than did its assignor, or any other transferee or the Soviet Government. * * *

"There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws. Cf. Todok *v.* Union State Bank, 281 U. S. 449, 50 S. Ct. 363, 74 L. Ed. 956."

In *Guaranty Trust Co. of New York* v. *United States*, supra (304 U. S. 126, at p. 143), Mr. Justice Stone made the same finding in the same language.

Since the plaintiff's title in the case at bar was derived solely from certain decrees promulgated by the plaintiff's predecessor-assignor, and the New York State Court has held that these decrees have no application to the property located in New York, this holding construing the New York Insurance Law is a separate, independent, adequate non-federal ground of decision which precludes review by this Court.

Because of the lengthy briefs being submitted to this honorable Court in the case at bar, and so as to shorten the within brief, the respondent respectfully calls the attention of this Court to an excellent discussion and full citation of cases on this subject in the *amicus curiae* brief on behalf of respondents Kentman, Gartoung, and others, filed by Osmond K. Fraenkel, as counsel in the *Moscow* case (No. 355, October, 1939 Term of this Court).

POINT TWO.

Summary Judgment in Favor of the Defendant Was Properly Granted by the New York Courts Under Rule 113 of the Rules of Civil Practice and the Decisions Construing This Rule.

The complaint in this action (R. 19-36d) was identical in substance and sought the same relief which the Government had unsuccessfully asserted in its petition in the *Moscow* case. The answer of the defendant, Louis H. Pink, Superintendent of Insurance (R. 37-49) set up the same defenses as had been successfully asserted and sustained by the defendants in the *Moscow* case. The complaint was verified on November 16, 1937, and the answer on March 28, 1938. The issues were left in *status quo* pending the decision by the New York Court of Appeals and by this honorable Court in the *Moscow* case, which all parties believed would be determinative of the questions at bar. When the New York Court of Appeals (in 280 N. Y. 286) decided the *Moscow* case, the Superintendent of Insurance, as trustee of the fund, desirous of terminating the litigation, closing the proceedings and paying the funds to their rightful owners, and being of the opinion that the *Moscow* case terminated once and for all the claims of the United States Government as to these funds, moved at Special Term, Part III, of the Supreme Court, New York County for summary judgment under Rule 113 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, "on the ground that there is no merit to the action and that it is insufficient in law." (Rule 113 and Section 476 are annexed to this brief as Appendix A for the convenience of this Court.)

That the New York Supreme Court at Special Term, Part III, where the motion was originally addressed and the New York Appellate Courts granted judgment for the defendant upon the basis of Rule 113 and not upon Section 476, appears very plainly from the orders and decisions in the

case at bar. The Special Term Justice (R. 52) stated in his memorandum decision:

> "Motion for summary judgment dismissing the complaint is granted (Moscow Fire Ins. Co. *v.* N. Y. Bank & Trust Co., 280 N. Y. 286) * * * ".

The ordering clauses in the order entered by the Special Term Justice upon the motion read as follows, (R. 6 and 7):

> "ORDERED, that the motion herein for an order *dismissing the complaint and awarding summary judgment* in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, *pursuant to Rule 113 of the Rules of Civil Practice,* be and the same hereby is in all respects granted, *and the said complaint be and the same hereby is dismissed on the merits;* and it is hereby further
>
> ORDERED, that the judgment herein be entered in favor of the defendant, Louis H. Pink, Superintendent of Insurance of the State of New York, and as Liquidator of the United States Branch of the First Russian Insurance Company Established in 1827, against the plaintiff, United States of America, *dismissing the complaint herein on the merits,* together with the costs of this action to be taxed by the Clerk, and that said judgment be entered by the Clerk of the Court without further order." (Italics ours.)

The judgment entered in the Supreme Court (R. 9) provides for a dismissal of the complaint *upon the merits.* The order entered on the remittitur following affirmance by the Appellate Division and Court of Appeals provided that the complaint is dismissed *on the merits* (R. 67). It is quite patent from the record that the New York Courts granted summary judgment for the defendant under Rule 113 rather than under Section 476 of the New York Civil Practice Act.

Rule 113 was originally based on the English Practice Act, Order 3, Rule 6, and Order 14, Rule 1. (*Comm. Credit Corp.* v. *Podhorzer*, 221 A. D. 644, 224 N. Y. S. 505; *Norwich Pharm. Co.* v. *Barrett*, 205 A. D. 749, 200 N. Y. S. 298). As interpreted by the courts of New York, it has been consistently held that the rule should be given a broad, liberal construction, since it is remedial in nature and designed to improve and make more efficient the administration of justice. (*Pross* v. *Foundation Properties*, 158 Misc. 304, 285 N. Y. S. 796; *Levine* v. *Behn* (1938) 169 Misc. 601, 605, 608, 8 N. Y. S. (2d) 58 (rev'd on other grounds 282 N. Y. 120); *Reddy* v. *Zurich G. A. & L. I. Co.*, 171 Misc. 69, 111 N. Y. S. (2d) 88). The rule was designed to prevent delaying of judgment by a denial good on its face but without actual support in fact (*Continental Securities Co.* v. *Interb. R. T. Co.*, 118 Misc. 11, 193 N. Y. S. 892, aff'd 200 A. D. 794) and offered relief to defendants as well as plaintiffs. The history of the rule shows it substantially to be the same as Section 57 of the New Jersey Practice Act. (P. L. 1912, pp. 394, 395).

In a recent case decided by the Second Circuit Court of Appeals (*Banco De Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438, 445) (summary judgment having been adopted in Rule 56 of the Federal Rules of Civil Procedure), Judge Clark made the following pertinent observation concerning motions for summary judgment:

> "These rulings but serve to show that the Courts look through the form to the substance of the matter presented and that the real requirement is of proof which if presented at a formal trial would be competent to support the issues to which it is directed."

Under the rule the court does not try the issue but ascertains whether, in fact, there is one to be tried (*Hanna* v. *Mitchell*, 202 A. D. 504, 196 N. Y. S. 43); and its object was to separate what is formal or pretended from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial (*Richard* v. *Credit Suisse*, 242 N. Y. 346; *McAnsh* v. *Blauner*, 222 A. D. 381). The accepted purpose of the rule was to expedite litigation

and do away with sham issues, thus obviating any delays and expense of trial. Such was the English rule from which Rule 113 derives its origin (*Roberts* (1895), 1 Q. B. 597, C. A.; *Nassau Press*, 70 L. T. 376; *Ex parte Spelman* (1895), 2 Q. B. 176).

The plaintiff contends that summary judgment was improperly granted since: (1) under Section 476, the allegations of the complaint are deemed to be admitted and, thus, factual issues are presented for trial; and (2) that the Superintendent, if he relied upon Rule 113, must have based his application on that portion of said rule which relies upon documentary evidence or official record.

As to the first contention, it is respectfully submitted that the Superintendent did not rely upon Section 476 of the Civil Practice Act, which is based solely upon the pleadings and does not permit consideration of supporting or opposing affidavits (*Velsor* v. *Freeman*, 118 Misc. 276; *Arverne Bay Constr. Co.* v. *Thatcher*, 250 App. Div. 482) but that he relied upon Rule 113 and his affidavit in support of the motion (R. 10, 12, 17), showing that there were no issues of fact or law to be tried. What did the plaintiff offer in rebuttal and in support of its complaint? The sole opposition to the Superintendent's motion is a two-page affidavit of Leon E. Spencer, an Assistant United States Attorney for the Southern District of New York, in charge of the Government's case (R. 50, 51). *In it no facts are set up to show the presence of any issues to be tried.* The affiant merely shows that since the decision of the Court of Appeals in the *Moscow* case, the Solicitor General of the United States has decided that an application for certiorari will be filed in due time in the United States Supreme Court seeking a review of this determination. Since, therefore, as he states, the decision of the Court of Appeals has not yet become final and will remain interlocutory until this Court passes upon the application for certiorari and then renders its decision in the case, he concluded:

> "It is therefore respectfully submitted that the motion made on behalf of the Superintendent of In-

surance for the dismissal of the Government's complaint in the above entitled action is premature and should be denied or else decision thereon withheld pending the final decision of the Supreme Court in the Moscow Fire Insurance Company case decision, in which case the Superintendent of Insurance alleges as his authority for the dismissal of the complaint herein."

It is quite patent from the record at bar that the Government conceded that there were no issues involved in this case, and that if the *Moscow* case were affirmed by this Court, relief must be denied to the United States in the *First Russian Insurance Company* case then pending. It now contends that since a decision by an equally divided court is merely *res judicata* between the parties and not *stare decisis*, it should be given an opportunity to re-litigate the entire question in the courts of New York, although foreign creditors, whose rights are affected by the Government's intervention, have been waiting patiently since 1917 for payment of their claims, and although in 1931, the New York Court of Appeals, prior to recognition of Russia and prior to the intervention in these proceedings by the United States, held that they had rights and should be paid. There must be an end to litigation sometime. This principle underlies Rule 113. Over 2,000 pages of testimony and hundreds of exhibits, exclusive of the various orders, decrees and motion papers, constituting three huge volumes, make up the record in the *Moscow* case. Upon all these facts it was fitting and proper for the New York courts to have ended this litigation and to have granted summary judgment upon the Superintendent's application.

On pages 2 and 3 of the Government's petition for a writ of certiorari herein, the following statement appears:

"The precise question here involved was before this Court in United States v. Moscow Fire Insurance Co., 309 U. S. 624, where the decision of the Court of Appeals of New York (280 N. Y. 286), upon which the decision in the instant case is rested, was

confirmed by an equally divided court. The only difference between the two cases is that in the Moscow cases, in which evidence was taken, there was an adverse decision below on a question of foreign law. * * *"

The question as to what portion of Rule 113 the Superintendent relied upon is not material, nor is the form of the documents or official evidence important. It was perfectly proper for the Court to examine, if it saw fit, the entire Moscow record or any portion thereof. It held, however, (284 N. Y. 555) that

> "The judgment appealed from is in accord with the decision of this Court in *Moscow Fire Insurance Company* v. *Bank of New York* (280 N. Y. 286, aff'd., without opinion by an equally divided Court, 309 U. S. 624; rehearing denied, 309 U. S. 697). Three of the judges of this Court concurred in a forceful opinion dissenting from the Court's decision in that case, but the decision left open no question which has been argued upon this appeal. We are agreed that without again considering such questions, this Court should, in determining title to assets of First Russian Insurance Company deposited in this State, apply in this case the same rules of law which the Court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here."

In the Government's reply brief before the New York Court of Appeals in the case at bar, we find the following interesting conclusion on page 8:

> "Plaintiff-appellant realizes that despite the division of this Court in the *Moscow* case and the participation in the present appeal of Judges who were not then on the Court, the natural inclination of this Court would be to abide by its prior decision, and let the United States Supreme Court reverse if reversal is to be. One consideration is relevant to this matter that has not already been called to the attention of the Court. The so-called 'separate-

> entity' theory is in its most obvious aspect a question of state law. While the appellant believes that in the circumstances of this case and of the *Moscow* case, that question is reviewable by the Supreme Court as a necessary incident of the decision of federal questions, the possible existence of an 'independent state ground' may obscure the otherwise clear cut issues presented for review by the Supreme Court. If a majority of this Court entertain grave doubts upon the validity of that theory, the question is therefore more fittingly reconsidered in this Court than in the Supreme Court of the United States."

Here we have practically a concession that the question is one for the state court to decide. In the same breath, however, the Government concludes that it would be the natural inclination of the state court to abide by its prior decision "and let the United States Supreme Court reverse if reversal is to be." The position of the Government in the case at bar is most inconsistent, to say the least.

Additional citations in support of the summary judgment granted below may be found in Points I and II of the *amicus curiae* brief being submitted to this honorable Court on behalf of the surviving directors by their counsel, Paul C. Whipp and Lounsbury D. Bates. One quotation, in particular, sums up the case at bar:

> "One trial of an issue is enough (*Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78; *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525)."

The interpretations of the New York Rules of Practice and Civil Practice Act are matters solely for the New York Courts to decide. This Court will follow the decision and interpretation placed upon such rules by the highest Court of New York State. (*Neblett* v. *Carpenter*, 305 U. S. 297, 302; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78; *Bacon & Sons* vs. *Martin*, 305 U. S. 380, 381; *Schuylkill Trust Co.* v. *Penn.*, 302 U. S. 506. 512.)

Appellant has not and cannot show, that the facts in this case differ in any respect from those adduced at the trial in the *Moscow* case. It would be futile, therefore, to remit this case for trial.

POINT THREE.

The decision in the *Moscow* case (280 N. Y. 286; affirmed 309 U. S. 624; rehearing denied 309 U. S. 697), was correct in all respects.

Throughout appellant's brief, it is repeatedly contended that the basis of the decision of the New York Court of Appeals in the *Moscow* case, as affirmed by this Court, was "intended to be and must have been the view that the Soviet decrees because of their confiscatory character are contrary to the local public policy. No other interpretation adequately explains the conclusion reached." This statement appears many times throughout the brief, although it was never so held by the New York Court of Appeals, and the opinion of Judge Lehman (Appendix A, annexed to appellant's brief) clearly shows that these statements have no foundation whatsoever. Judge Lehman held that in spite of the public policy of this State, and in spite of all conceptions "rooted in our age-old common law traditions of ordered liberty," it was incumbent upon our courts after recognition of the Soviet Government to recognize its decrees even though they were confiscatory and repugnant to all principles and traditions of the common law. Our Courts, however, could construe the decrees and determine their effect if any, on property situate in New York. At page 314 of the decision (R. 108, 109), Judge Lehman concluded as follows:

> "The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public

policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."

Briefly stated, the Court of Appeals' decision in the *Moscow* case, as affirmed by this Court, was based upon the following grounds:

(1) That the Soviet decrees were either not intended to affect or, if so intended, could not have affected extra-territorially the property and assets in New York State of the domesticated United States branch established here in 1907. The voluminous testimony and evidence in the Moscow proceeding amply supported the holding to this effect by the referee and by the courts below, the foreign law being under the New York procedure a question of fact to be established as such upon the trial. The effect of such decrees as respects property situated in the State of New York must be interpreted under the New York law;

(2) Under the statutes and decisions of the New York courts, the United States branch is a separate domestic corporation, apart and distinct from the corporation at the domicile, and its assets are not subject to transfer or other disposition by the home office.

(3) The liquidation proceedings in New York were proceedings *in rem* over which the New York courts had sole and exclusive jurisdiction. By the decision of the Court of Appeals in *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, foreign creditors were invited into the proceedings and given vested rights in the surplus assets, all prior to the assignment and so-called treaty by the Soviet Government to the United States. Having proceeded diligently to enforce such rights in the courts of this state, the claims of such creditors may not be dismissed in favor of the Government's claim. The previous orders and decrees allowing and directing payment of foreign claims, duly

entered by the New York Courts may not be nullified and set aside.

As to subdivision (1) hereinabove, respondent will not burden this Court with a lengthy discussion of the facts and law established in the *Moscow* case. The learned opinion of Judge Lehman in that case (Government's brief herein, Appendix A, pp. 86-109) and the briefs filed with this honorable Court on the argument (309 U. S. 624) leave nothing unsaid, and respondent respectfully refers herein to said opinion in toto and to such briefs and invites the attention of this Court thereto.

As to subdivision (2), the opinion of Judge Lehman gives the history and statute and decision law appertaining to the separate entity of the domesticated United States branch. An historical review of this subject is set forth in the Superintendent's first report in this proceeding (found in Case on Appeal, 255 N. Y. 415). For the convenience of this Court this portion of the Superintendent's report is annexed to this brief as Appendix B.

As to subdivision (3), this Court has held, and appellant must concede, that the liquidation proceedings are *in rem* (*United States* v. *Belmont*, 301 U. S. 324); *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463; *Banco de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438, 442; *Sullivan* v. *The State of Sao Paulo* (Second Circuit Court of Appeals, 122 Fed. (2nd) 355, decided August 4th, 1941).

Mr. Justice Stone in the *Belmont* case, at page 335, stated:

> "But it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. (citing cases) * * *
>
> "In conformity to this doctrine, New York would have been free to enforce a local policy, subordinating the Soviet Government, as the successor of its national, to local suitors. Its judicial decisions

> indicate that such may be its policy for the protection of creditors or others claiming an interest in the sum due. (citing cases)"

Mr. Justice Stone at page 335, further held that the United States was in no better position than its assignor and that the Government obtained no greater rights nor did the treaty purport or intend to alter the laws and policy of any state in which the debtor of an assigned claim might reside (in this case, New York). Therefore, that the United States, as assignee of the Soviet, could collect only in conformity with the New York laws. (Mr. Justice Brandeis and Mr. Justice Cardozo concurred in this separate opinion; there was no dissenting opinion by any member of this Court.)

In *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, Chief Justice Hughes, commencing at page 475, discussed at length and in detail the First Russian Insurance Company situation, concluding in a forceful statement of the law that the New York courts took jurisdiction of the *res;* that the proceeding was one *in rem*, and the fund at all times subject to New York courts' control. When the domestic creditors were paid, Chief Justice Hughes said that it did not follow that the remaining assets were automatically released and the state court shorn of its jurisdiction. The state court still had control and pertinent equitable jurisdiction to decide what should be done with the fund. Justice Hughes summed up the situation in the following language:

> "In No. 197 (the First Russian situation) the Superintendent still holds possession by virtue of that authorization and the *res* thus remains under the court's jurisdiction" (parenthesis ours).

Without deciding the case on the merits, the United States was denied relief in the federal court and was remitted to the state court proceedings.

The case at bar does not involve any question of a refusal by the State of New York or its courts to recognize the sovereignty and the paramount rights of the United States Government as such. There exists no such conflict in this case, although appellant throughout its brief endeavors to becloud the issues by arguing to this Court that the State of New York, its courts, and the Superintendent of Insurance are asserting rights in contravention to the rights of the sovereign. No extended argument is necessary to convince this honorable Court that there is no such issue in the case at bar. The New York courts and the Superintendent of Insurance, as Liquidator, recognize the exclusive right of the executive branch of the Government to decide political as opposed to judicial questions. We have no political question in the case at bar. An interesting and recent discussion of this subject may be found in the opinion of Circuit Judge Clark in *Sullivan* v. *The State of Sao Paulo, supra,* recently decided on August 4, 1941. After making the foregoing holding, Judge Clark continued as follows:

> "The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no executive department of the government is constitutionally or practically equipped to discharge (Banco de Espana *v.* Federal Reserve Bank, supra). Every court has the general power to pass on questions affecting its own jurisdiction (Stoll *v.* Gottlieb, 305 U. S. 165, 59 S. Ct., 134, 83 L. Ed., 104), and where that jurisdiction is in rem or quasi in rem, as based upon property in its control, no executive action can deprive the court of jurisdiction—or even constitute evidence of rights in the property—except in so far as such rights depend on the settlement of 'political' questions, as on issues of sovereignty of a party or his assignor (United States *v.* Bank of N. Y. & Trust Co., 296 U. S. 463, 56 S. Ct., 343, 80 L. Ed., 331; Berizzi Bros. Co. *v.* SS. Pesaro, 271 U. S. 562, 46 S. Ct., 611, 70 L. Ed., 1088; see United States *v.* Belmont, 301 U. S. 324, 57 S. Ct., 758, 81 L. Ed., 1134)."

The final order entered in the liquidation proceedings pursuant to the decision of the Court of Appeals in 255 N. Y. 415, is binding upon the world and forecloses any interest of the Soviet Government or its assignee, the United States Government. The underlying purpose of an action *in rem* is founded upon public policy and based upon the interest of the state that there should be a definite end at some time to litigation. The language of Judge Cardozo in 255 N. Y. 415 clearly shows how firmly this proposition of law was imbedded in the mind of the court.

This Court in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172, said:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as there should be a place to begin litigation."

Surely it may not be contended that the United States Government, as assignee, may impeach or set aside the final orders or judgments of the New York courts in proceedings *in rem*, made and entered prior to the assertion of any rights by the United States Government as assignee.

The *Belmont* case before this Court, and *United States* v. *Manhattan Co.*, (276 N. Y. 396), referred to many times, offer no solace to the Government in the case at bar. Both cases came up for review before the higher courts on motions which, under applicable statutes, deemed as admitted the allegations of the complaint. Nothing was decided on the merits and, indeed, the opinions in the *Belmont* case support respondent's contentions rather than those of appellant. If *U. S.* v. *Manhattan Co.* is, nevertheless, relied upon by the appellant, suffice it to point out that the subsequent opinion of the Court of Appeals in the *Moscow* case (280 N. Y. 286) controls.

The funds while deposited with the trustee primarily for the benefit of United States creditors and policyholders of the Company, were received for the benefit of all its policyholders, creditors and stockholders wherever they might be (*Matter of People (City Equitable Fire Ins. Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Ins. Co.)*, 242

N. Y. 148, 165.) Under normal conditions, and where a domiciliary receiver or liquidator existed at the domicile in a country recognized by us, the surplus assets would have been transmitted there for distribution to the rightful owners. The Russian liquidation proceedings presented a unique situation, described by Judge Cardozo in 255 N. Y. 415. There was no recognized government nor was there a liquidator or receiver at the domicile to whom the funds might be sent for distribution. Judge Cardozo (in 255 N. Y.) and Judge Lehman, in the *Moscow* case, (280 N. Y.) held that the result of the Russian decrees upon the liquidation proceedings here presented "a tangle of juristic rights and obligations which cannot be unravelled by a strict logical application of juristic concepts * * *. The situation is not only without precedent but anomalous and there can be no true precedent in the books, when the facts are unprecedented."

The New York court held that it might either hold the funds in accordance with the Superintendent's plan, or might in the exercise of its broad powers, provide in the extraordinary condition then prevailing, an extraordinary method of administering and distributing the assets then in the control and custody of the state. The latter course was chosen. Judge Cardozo, referring to these foreign claimants whose proofs of claim were filed and diligently pressed while the Superintendent was in charge and the injunction still in force, said 255 N. Y. p. 423:

> "The creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts. There would be manifest inequity if at this late day an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew" (citing authorities).

The court found it just and proper to direct the liquidator here to adjudicate all claims filed with him. In protecting

creditors and shareholders the New York courts were merely carrying out the purpose of the statutory trust created under the New York law and were acting in accordance with just and equitable principles.

The United States in pressing its claim as suitor cannot ask to be relieved from the position which an ordinary suitor occupies merely because it is a sovereign. It is bound by the public policy of the State of New York and by that of the nation in the same manner as private litigants. (*Standard Oil Co.* v. *United States*, 267 U. S. 76, 79; *United States* v. *The Thekla*, 266 id. 328, 339; *Folk* v. *United States*, 233 Fed. 177, 192; *United States* v. *Midway Northern Oil Co.*, 232 id. 619, 631.)

The learned referee, in his decision in the *Moscow Fire Insurance Co.* case (161 Misc. 903; aff'd 280 N. Y. 286; 309 U. S. 624), at page 918, held as follows:

> "The actual situs of the surplus having been in a depositary within this State either with trust companies under the Insurance Law or the defendant bank by court order, this conferred upon the courts of this State full dominion over such deposit, held, as it was, by law or order of our courts. (Clark *v.* Williard, 294 U. S. 211, 214; 292 id. 112, 123; City Bank *v.* Schnader, 293 id. 112, 118; Pennington *v.* Fourth National Bank, 243 id. 269, 271; Spencer *v.* Myers, 150 N. Y. 269; Vladikavkazsky Railway Co. *v.* New York Trust Co., 263 id. 369; Petrograd'sky M. K. Bank *v.* National City Bank, 253 id. 23.)
>
> "The intervening claimant must submit to the mandate of the municipal law that has the physical control of that which it would reduce to its possession. (Clark *v.* Williard, supra.) The question who is the owner of the claim depends for its answer upon the law of the place where the securities or deposit are located. (Burnet *v.* Brooks, 288 U. S. 378.)
>
> "The deposit here in question was created by New York law (Insurance Law, § 27). The surplus was created by the same law (Insurance Law, § 63). It was invested in domestic securities.
>
> "Normally, at the end of domestic liquidation the surplus would have been remitted to a domiciliary re-

ceiver. (Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148; Matter of People (City Equitable Fire Ins. Co.), 238 id. 147; Matter of People (Russian Reinsurance Co.), 255 id. 415; Matter of People (Moscow Fire Ins. Co.), Id. 432.) Solely because of the fact that Russia was not recognized in 1931 when the funds would normally have been transmitted, such remission could not take place, and this surplus left over after the domestic liquidation was directed to be disposed of here. (Matter of People (Russian Reinsurance Co.), 255 N. Y. 415; Matter of People (Moscow Fire Ins. Co.), Id. 432; Matter of People (First Russian Ins. Co.), Id. 415.)"

In *Clark* v. *Williard*, 294 U. S. 211, at p. 214, referring to the title of a foreign statutory successor of a dissolved foreign corporation, this Court said:

> "He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession."

The enforcement by the Courts of New York of foreign laws and decrees affecting property here may not be demanded as a matter of right. The effect if permitted at all, is only because of the comity which exists between states and nations. This comity will not be extended if intervening rights of citizens, or foreigners coming into our courts, have been established by rules or decisions of our local courts. Each state has the power to determine for itself the conditions upon which property situated within its territory, both personal and real, may be acquired, enjoyed and transferred.

It cannot be disputed that rights which have been acquired here in New York in and to property situate in New York will be protected by the New York courts, and by this court whether they belong to non-residents of the State of New York or foreigners or inhere in its own citizens or residents. (*Barth* v. *Backus*, 140 N. Y. 230; *Matter of People* (*Norske Lloyd Ins. Co.*) *supra; United States Constitution, Fifth Amendment and Fourteenth Amendment; Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491, 492).

Conclusion

As far as this record discloses, even without the analysis made by the Superintendent as to the present status of the fund (footnote, p. 6, *supra*) there is and will be no surplus after paying the adjudicated and already filed claims of foreign creditors with interest and the attachment claims in suit. There are no claims of shareholders in this proceeding, and, as far as the surviving directors are concerned, their only interest could be to see that all creditors, both domestic and foreign, receive just treatment and payment of just claims. When this is accomplished there will be no residium which, ordinarily, would be transferable to the domiciliary liquidator or to a quorum of the board of directors (255 N. Y. 415).

The respondent at bar, as trustee of the fund, charged with the duty of distributing it to its rightful owners, respectfully submits that the writ of certiorari should be dismissed because improvidently granted, or, if not dismissed, that the judgment below should be affirmed, so that the claims of creditors with vested rights already adjudicated by the New York courts may be paid without further delay, and the Superintendent of Insurance, as liquidator and trustee, may bring to an end the liquidation proceedings now pending over sixteen years in the courts of the State of New York.

Respectfully submitted,

ALFRED C. BENNETT,
Counsel to the Superintendent of Insurance of the State of New York, as Liquidator of the Domesticated United States Branch of The First Russian Insurance Company, Established in 1827, Respondent.

December, 1941.

Appendix A

New York Civil Practice Act

§ 476. Judgment on Pleadings or Admission of Part of Cause. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

New York Rules of Civil Practice

Rule 113—Summary Judgment. When an answer is served in an action.

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale of purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.)

Appendix B

Extract from Superintendent's First Report, Audit and Petition dated August 11th, 1927, filed in New York Supreme Court on August 18th, 1927 and part of record in 255 N. Y. 415.

The Public Acts, Statutes, Laws and Public Policy of the State of New York Under Which the Domesticated United States Branch Was Established, Transacted Business and Is Now Being Liquidated.

Upon information and belief, the State of New York under the Constitution of the United States and under its own Constitution, is endowed with governmental functions and sovereign duties adequate to supervise, regulate and control in all of its forms and manifestations, the business of insurance and any or all persons, firms, corporations, or other entities engaged, attempting to engage or seeking to engage or representing an engagement therein. That the State first exercised its said reserved power in respect of insurance supervision, regulation and control in or about the year 1814, when it commenced the supervision, regulation and control of the business of insurance and persons, firms, associations, corporations and other entities engaged or attempting to engage or representing that they were engaged or intended to engage in such business within the jurisdiction of the State. Said supervision, regulation and control was, on the 6th day of December, 1894, continued, when the State adopted and promulgated a new and revised Constitution under which it again reserved and retained unto itself the power to continue such supervision, regulation and control. Since the adoption of its Constitution of 1894, the State has from time to time enacted public acts, statutes and laws for the supervision, regulation and control of the business of insurance and of all individuals, firms, corporations and other entities engaged, attempting to engage or representing that they were engaged or in-

tended to engage therein, and particularly reference is here made to Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereto, all of which at all the times hereinafter mentioned have remained in full force and effect and have been administered by the State within its jurisdiction. Said supervision, regulation, control and public policy evidenced by such public acts, statutes and laws, comprehends and extends from the creation, organization, incorporation and admitting of persons, corporations and other entities engaged or intending to engage in such business, through their entire continuance in the business, and to and including the dissolution, forfeiture and annullment of their charters, licenses or authorities granted, the fixing, ascertaining and determining of their assets and liabilities and the distribution of their property and assets in cases of insolvencies or other delinquencies, as more fully shown by said public acts, statutes, laws and the judicial and administerial decisions of the various governmental departments of said State and particularly by Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereof to date. In particular the public acts, statutes, laws and public policy of the State of New York at all the times hereinafter mentioned provided that any alien insurance corporation or other insurer of or organized and existing under the laws of any recognized foreign country may do business within the State of New York the same as a domestic corporation or other insurer, provided any such alien foreign insurance company or other insurer would first establish and erect a domesticated United States Branch to be in law and in fact in the State of New York, and in other states of the United States under reciprocal laws, a domestic corporation or insurer of the State of New York with the same charter, powers, rights and responsibilities that a domestic corporation or other insurer of the same kind and class would have; that such a domesticated United States Branch must be a separate and distinct corporation

from its creator; that its assets, property and liabilities incurred by reason of its New York domestication and its transaction of business within the jurisdiction of New York and elsewhere in the United States would be separate, distinct and apart from the creating corporation and that the business and affairs of the creating corporation in foreign countries would bear no relation to nor have any effect upon the business or affairs of the domesticated United States Branch; that in case its domesticated United States Branch should become delinquent, insolvent, hazardous or otherwise incapacitated to function as a domestic corporation, or in case the creating corporation should become insolvent, delinquent or hazardous, or placed in the hands of a receiver or had its property sequestrated in its domiciliary state or country or in any other state or country, the domesticated United States Branch would become subject to liquidation by the state, the same as if it were a domestic corporation and that in case any such liquidation should take effect, the surplus funds arising after payment of all debts and liabilities incurred by the domesticated United States Branch in the transaction of its business would be transmitted by the State to the legal representative of the creating corporation at its domicile, as more fully shown by the provisions of Chapter 28 of the Consolidated Laws, being Chapter 33 of the Laws of 1909, and the amendments thereto, as construed by the executive, judicial and legislative divisions of the Government of the State of New York..

For the purpose and with the intent of executing, enforcing and administering its said public policy in relation to the business of insurance and its public acts, statutes, and laws concerning the same, the State erected and established and has ever since maintained and still maintains a separate department in its State Government, which separate department is known as the "Insurance Department", and which said State has endowed with powers and authority adequate to administer its public acts, statutes, laws

and the public policy of the State with reference to the business of insurance and all persons and other entities engaged or attempting to engage or representing that they are engaged or intend to engage therein.

By the aforesaid public acts, statutes, laws and public policy of the State of New York, the state offered to exercise its governmental functions and sovereign duties reserved under its police powers, in such a way that said public acts, statutes, laws and public policy would be carried out in good faith for the protection of any qualified alien foreign insurer of a recognized nation that would accept the terms and conditions of such offer and in pursuance thereto establish a domesticated United States Branch and furnish to the people of the State of New York and of other states of the United States under reciprocal laws, insurance facilities. The State represented that in the event of a delinquency or failure of any such domesticated United States Branch or by reason of the insolvency, delinquency or hazardous condition of the creating corporation or if the creating corporation, should be placed in the hands of a receiver or should have its property sequestrated in its domiciliary state or country or any other state or country, it would, through its Insurance Department, liquidate such a domesticated United Stated Branch and after paying all creditors and policyholders thereof and the expenses of liquidation, remit to the alien foreign creating corporation or its legal representative at its domicile the surplus remaining at the conclusion of such a proceeding.

The said offer of the State of New York ran not only to any alien foreign insurance corporation or other insuring entity that might accept the same, but under international law it ran to and inured in favor of the nationals of all foreign countries whose governments are recognized by the Government of the United States of America and who might deal with said alien foreign insurance corporation or its domesticated United States Branch or who might be affected by the acceptance of the offer of the State of

New York. The acceptance of the offer by an alien foreign insurance entity gave to the nationals of foreign countries whose governments were recognized by the United States Government the right, under the laws of nations, to rely upon the good faith of the State of New York and its officers and the various divisions of its State Government in carrying out the terms and provisions of such offer, and in remitting to the creating corporation or its legal representative at its domicile all surplus funds remaining after paying all debts and expenses of liquidating the domesticated United States Branch, there to be distributed to the nationals of all countries under international law which applies in such cases the equitable principle that equality is equity among the interested nationals of all civilized governments. *Matter of People* (Norske Lloyd Ins. Co. Ltd.) 242 N. Y. 148; *Canada Sou. Ry. Co.* v. *Gebhard*, 109 U. S. 527; *Martine* v. *International L. Ins. Soc.*, 53 N. Y. 339; *Virginia* v. *United Cigarette Co. Ltd.*, 119 Va. 447. The said public acts, statutes, laws and public policy of the State of New York were at all the times hereinafter mentioned municipal public acts, statutes, laws and public policy of the State of New York regularly and duly promulgated, adopted and administered. That they were and still are obligatory and binding upon the State of New York and the Government of the United States under its Constitution, its national laws and under international law recognized by the Government of the United States, and said public acts, statutes, laws and public policy of the State of New York were at all the times hereinafter mentioned and still are maintained and sustained in full credence, respect, recognition, force and effect before the governments of all foreign nations and states and particularly those recognized by and which in turn recognize the Government of the United States of America.

The Creation of the Domesticated United States Branch.

After the State of New York had reserved to itself as a governmental function the sovereign right to supervise, regulate and control in all of its forms and manifestations the business of insurance, and after the State had found that it was necessary to exercise that function for the protection of the commercial wealth, health, happiness and comfort of its people and the people of the United States of America, and while the State was performing for the people the duties resulting from such reserved powers and its finding of a necessity for the exercise thereof, and while its aforesaid public acts, statutes, laws and public policy on the subject were in full force and effect, and while the same were being executed and administered by the State, the First Russian Insurance Company Established in 1827, of Petrograd, Russia, was in or about the year 1827, organized and incorporated under a statute of the Czar of Russia, whose government was at that time recognized as a friendly government by the Government of the United States of America. Thereafter and in or about the year 1907, and while full recognition of the Government of the Czar of Russia by the Government of the United States was in full force and effect, said First Russian Insurance Company Established in 1827, of Petrograd, Russia, under and pursuant to the aforesaid public acts, statutes, laws and public policy of the State of New York, created and established in the State of New York a domesticated United States Branch which was thereupon authorized by the State of New York to engage in the business of insurance in the State of New York and elsewhere in the United States under reciprocal laws then in force in other states, which extended credence and faith to such a domesticated Branch while existing under the public acts, statutes, laws and public policy of the State of New York.

Transactions Resulting in the Creation and Establishment of the Domesticated United States Branch.

Transactions of the First Russian Insurance Company Established in 1827, of Petrograd, and others which resulted in or contributed to the creation and establishment of the domesticated United States Branch and which are material to a proper consideration and determination of questions presented or which may be presented in this proceeding are fully set forth in the reports of the examiners of the New York Insurance Department, which reports are annexed to or referred to in the moving papers on which the liquidation order in this proceeding was made and granted. Those reports are here made a part of this report the same as if here fully set forth and repeated.

After said domesticated United States Branch was established in 1827, by the aforesaid acts and transactions of the First Russian Insurance Company Established in 1827, of Petrograd, and under the aforesaid circumstances and public acts, statutes, laws and public policy of this state, said domesticated United States Branch immediately commenced business and continued in business until July 13, 1925, when the Superintendent of Insurance of the State of New York, pursuant to said public acts, statutes, laws and public policy of the State of New York, made application to the Supreme Court for an order to take possession of the assets and conserve them for the benefit of the policyholders, creditors, stockholders and the public.